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Supreme Court, U.S.
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No. 04-674

IN THE
Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

BRYAN D. COLLINS, *et al.*, and JOHN W. STEWART, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant can remove a case containing diverse and non-diverse defendants based on a theory of fraudulent joinder when the argument proffered to prove fraudulent joinder, if correct, would be dispositive of the case against both the diverse defendants and the non-diverse defendants.

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STATEMENT OF THE CASE

Mercury exposure has long been known to cause serious neurological effects in humans and to interfere with the development of children's nervous systems. For many years, thimerosal, which is 49.6 percent mercury, was used as a preservative in many vaccines administered to children.

This opposition is filed on behalf of all respondents in two separate appeals consolidated before the Fifth Circuit. In one of the cases, *Collins v. American Home Products Corp.*, parents of children who suffered severe health problems after being injected with vaccines containing thimerosal filed suit in Mississippi state court against physicians, pharmacies, and pharmaceutical companies who had prescribed, marketed, sold, or manufactured vaccines and/or the thimerosal used in vaccines. The parents sought recovery under state-law theories of strict liability, negligence, fraud, negligent misrepresentation, and breach of warranty. They argued that the vaccines were defectively designed and inadequately tested, and that the defendants failed to warn them about the vaccines' risks. Complaint at 9-21, 25-32.

Although some defendants are Mississippi citizens, the defendants removed the case to federal district court, claiming both diversity and federal question jurisdiction. With respect to diversity jurisdiction, defendants asserted that plaintiffs had failed to exhaust their administrative remedies with respect to the Mississippi defendants, as required by the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1 *et seq.* ("Vaccine Act"). The Vaccine Act directs that a plaintiff seeking compensatory damages against a vaccine manufacturer or administrator for injuries caused by a vaccine must first file a petition with a special "Vaccine Court" under the jurisdiction of the United States Court of Federal Claims. *Id.* § 300aa-11(a)(2)(A). Defendants contended that plaintiffs' failure to file

their claim against the Mississippi defendants with the Vaccine Court divested the state court of jurisdiction over the claims against those defendants, and, therefore, that the Mississippi defendants had been fraudulently joined. R.E. Tab 6 at 3-4.[1]

Plaintiffs moved to remand, arguing that the exhaustion requirement did not apply because injuries associated with thimerosal were not "vaccine-related" injuries, as defined by the Vaccine Act. Thimerosal, they explained, is an "adulterant or contaminant," and the definition of vaccine-related injuries in the Act specifically excludes conditions associated with intentionally added adulterants or contaminants. *Id.* at 7-8. The district court granted plaintiffs' motion to remand, finding no basis for federal question jurisdiction and holding that the in-state defendants were not fraudulently joined because there was a possibility of recovery against them. *Id.* at 15-16.

Defendants moved for reconsideration. R.E. Tab 5. The district court granted the motion, holding that, in light of a newly issued Vaccine Court order asserting jurisdiction over certain thimerosal-related claims, there was no reasonable possibility that the plaintiffs could recover against the Mississippi defendants. Pet. App. 17a-18a. Having held that removal was proper, the court then dismissed the entire case on the ground that plaintiffs had not exhausted their Vaccine Act remedies as to the claims against any defendant. *Id.* 6a-7a.

The *Collins* plaintiffs appealed, and the appeal was consolidated with another case, *Stewart v. American Home*

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[1]Citations to R.E. refer to the Record Excerpts filed in the Fifth Circuit in *Collins v. American Home Products Corp.*, No. 02-60736.

Products Corp. Stewart was based on identical facts but was brought on behalf of some of the parents themselves. The appeal in *Stewart* raised the same joinder issues as the appeal in *Collins*.

While the *Collins* and *Stewart* appeals were pending, the Fifth Circuit issued *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir. 2003). There, a diverse defendant removed a case to federal court on the basis of diversity jurisdiction, even though the other defendant was not diverse. The district court denied the plaintiff's motion to remand, finding that the non-diverse defendant was fraudulently joined because the claims against it were preempted by the Federal Railroad Safety Act (FRSA). The court then granted summary judgment to the diverse defendant on that same ground—that the claims against it were preempted by the FRSA. The Fifth Circuit reversed, refusing to find fraudulent joinder based on a defense that was equally dispositive of the claims against the diverse and non-diverse defendants. It indicated that finding fraudulent joinder under such circumstances would be "contrary to the Supreme Court's century-old command in [*Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146, 153 (1914)] that the fraudulent joinder allegations be directed toward the joinder, not to 'the merits of the action as an entirety.'" *Smallwood*, 342 F.3d at 407.

Soon thereafter, the Fifth Circuit issued its decision in *Collins* and *Stewart*. In a brief opinion, the court relied on *Smallwood* for the proposition that "[w]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court." Pet.

App. 4a (quoting *Smallwood*, 342 F.3d at 405 (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990))). The court vacated the dismissal of plaintiffs' claims and remanded with instructions that *Collins* and *Stewart* be remanded to state court. *Id.* 5a.

The Fifth Circuit subsequently granted rehearing en banc in *Smallwood* and stayed the mandate in *Collins* and *Stewart* pending its en banc decision. The en banc court affirmed the panel court's decision in *Smallwood*, holding that "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 571 (5th Cir. 2004) (en banc). Citing *Cockrell*, the court explained that the purpose of the fraudulent joinder theory is to determine whether the in-state defendants have been properly joined. In *Smallwood*, although the diverse defendant made its preemption argument first with respect to the non-diverse defendant only, the argument did not go to the propriety of the joinder, but to the merits of the entire case. The court explained that allowing a federal court to decide a case with both diverse and non-diverse defendants just because the federal court deemed the case meritless "is not a rule of joinder, but a recrafting of *Strawbridge* [*v. Curtiss*, 7 U.S. (3 Cranch.) 267 (1806)]," which held that complete diversity is necessary for diversity jurisdiction. *Id.* at 576. The Court concluded by noting that the decision to extend federal jurisdiction to cases in which there was not complete diversity was a political decision that could not be made by federal courts, but only by Congress. *Id.*

After issuing its en banc decision in *Smallwood*, the Fifth Circuit denied the *Collins* and *Stewart* defendants' motions for

panel rehearing and for rehearing en banc. Pet. App. 22a. Some of the diverse defendants also moved to stay the mandate in light of *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004), which held that claims against thimerosal manufacturers are not subject to the Vaccine Act because thimerosal manufacturers are not "vaccine manufacturers" as defined in the Act. The Fifth Circuit denied that motion as well.

REASONS FOR DENYING THE WRIT

A. The Question Presented Depends On The Resolution Of An Independent Question That Is Not Presented For Review.

Under the Fifth Circuit's decision, because the basis for dismissing the Mississippi defendants would justify dismissing the entire case against all defendants, joinder of the non-diverse defendants was not "fraudulent" or "improper." Neither *Collins* nor *Smallwood* decided or even considered how this analysis would apply in a case where the basis for dismissal of the non-diverse defendants applies to some but not *all* of the diverse defendants.

The question presented in the petition, therefore, arises in these cases only if *all* of the claims against *all* of the defendants are subject to the Vaccine Act. However, if thimerosal is an intentionally added contaminant or adulterant, *see* 42 U.S.C. § 300aa-33(5), or if thimerosal manufacturers are not "vaccine administrators or manufacturers," *see id.* § 300aa-11(a)(2)(A), the Act's exhaustion requirements do not apply to some or all of the defendants.

Accordingly, to determine whether the question presented in the Petition is in fact presented in the case, the

Court would first have to decide whether the Vaccine Act's claim procedure applies to thimerosal-related injuries and thimerosal manufacturers. That narrow issue is unresolved. Indeed, Petitioners themselves seem to disagree on this point. *See* Pet. 20 n.8. And yet petitioners do not seek certiorari on that issue. Moreover, after considering that issue, the Court might conclude that the question presented to the Court is not, in fact, presented in this case.

B. There Is No Meaningful Circuit Split On The Question Presented.

Petitioners' primary argument for review is that the decision below created a circuit split. No circuit court that has analyzed the issue, however, has disagreed with the Fifth Circuit that fraudulent joinder cannot be based on a defense or claim that disposes of the case against both the diverse and non-diverse parties. To the contrary, the only other federal circuit to have discussed the issue—the Third—also held that fraudulent joinder cannot be based on claims or defenses common to both diverse and non-diverse parties. *See Boyer v. Snap-On Tools*, 913 F.2d 108 (3d Cir. 1990).

Petitioners attempt to manufacture a conflict by pointing to *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998). There, however, the plaintiff did not argue that the common defense theory applied,[2] and the court did not analyze the issue. In *Ritchey*, the plaintiff brought suit in state court against one diverse and two non-diverse defendants. The same plaintiff had previously sued in federal court against the diverse defendant

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[2]The plaintiff's appellate briefs in *Ritchey* are available on Westlaw at 1996 WL 33417453 and 1997 WL 33493575.

based on the same underlying facts, but that case had been dismissed because the statute of limitations had run. The Ninth Circuit's discussion of fraudulent joinder focused on whether the plaintiff stated a cause of action against the in-state defendants, given that the statute of limitations against them had already run. The court concluded that the plaintiffs did not state a cause of action and, thus, that the in-state defendants had been fraudulently joined. In the final paragraph of this discussion, the court noted that it was "slightly peculiar" to call the in-state defendants sham defendants when the statute of limitations had also run against the diverse defendant. *Id.* at 1320. Then, in a single sentence and without citation to any authority, the court stated that, nonetheless, the failure to state a claim demonstrated that the in-state defendants were sham defendants. *Id.* Petitioners' assertion that there is a split between the circuits depends on this one passing observation by the Ninth Circuit.

Somewhat half-heartedly, petitioners suggest that *LeBlang Motors, Ltd. v. Subaru of America., Inc.*, 148 F.3d 680 (7th Cir. 1998), presents an "implied split" with the decision below. Pet. 23 & n.12. In *LeBlang*, the court did not even consider whether fraudulent joinder could be based on defenses shared by diverse and non-diverse defendants. Rather, it upheld the dismissal of non-diverse defendants because the statute of limitations against them had run, without mentioning in the discussion of fraudulent joinder that at the time the case was filed the statute of limitations against the diverse defendant had run as well. The opinion offers no indication that the court gave any thought to the question presented here, and the common defense issue is not an aspect of the Seventh Circuit's holding.

Because no court of appeals to have analyzed the issue has disagreed with the decision below, the petition should be denied.

C. This Court Should Not Review Whether The Fifth Circuit Correctly Applied Its Own Precedent.

Petitioners argue at some length that the Fifth Circuit erred in applying *Smallwood* to this case, where the defense at issue was procedural, as opposed to a defense on the merits. Pet. 17-20. This argument, however (and the second question presented, which is based on it), addresses the Fifth Circuit's application of its own precedent. The question whether a court properly applied its own precedent is a matter for that court. Moreover, the Fifth Circuit clearly disagreed with petitioners' analysis of its case law, as it denied their petition for en banc review and their motions to stay the mandate. *See* Pet. App. 22a; *Collins v. Am. Home Prods. Corp.*, No. 02-60736 (5th Cir. Dec. 1, 2004) (unpublished order) (denying motion to recall and stay the mandate); *Collins v. Am. Home Prods. Corp.*, No. 02-60736 (5th Cir. Nov. 12, 2004) (unpublished order) (denying motion to stay the mandate).

Similarly, petitioners (except Eli Lilly and Company) assert that the Circuit's common defense doctrine should not have been applied in this case because of the Fifth Circuit's later decision in *Moss*, 381 F.3d 501. Again, the Fifth Circuit denied petitioners' motions on this point. *Collins*, Order dated Dec. 1, 2004, *supra*; *Collins*, order dated Nov. 12, 2004, *supra*. And whether the Fifth Circuit correctly applied its own law is not a question that merits this Court's attention.

D. The Decision Below Is Correct.

This Court has recognized that when a showing "indicate[s] that the plaintiff's case was ill founded as to all the defendants," such a showing goes "to the merits of the action as an entirety, and not to the joinder." *Cockrell*, 232 U.S. at 153

(1914). In other words, such a showing does not "engender or compel the conclusion that the [in-state defendants] were wrongfully brought into a controversy that does not concern them." *Id.*

Both the Third and Fifth Circuits have applied *Cockrell* to hold that defenses that are determinative of the claims against all of the defendants cannot be used as a basis for a finding of fraudulent joinder. As this Court did in *Cockrell*, those courts recognized that when a court concludes that a case is untenable as to all defendants, it is not deciding an issue related to joinder; rather, it is determining the entire case. "In such cases, it makes little sense to single out the in-state defendants as 'sham' defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such[.]" *Smallwood*, 385 F.3d at 574.

The courts of appeals' holdings on common defenses ensures that the theory of fraudulent joinder remains true to the purposes for which it was created. As petitioners point out, the fraudulent joinder doctrine is intended to guarantee that non-diverse defendants are not joined solely to defeat diversity jurisdiction. *See* Pet. 9. If a defense common to all defendants could form the basis for a finding of fraudulent joinder, then fraudulent joinder could be found in many cases in which the plaintiff did not sue the non-diverse defendant for the improper purpose of defeating diversity, but in which the plaintiff just had a weak case.

The decision below also protects the boundary between state and federal jurisdiction. Plaintiffs are entitled to have state courts decide the merits of cases alleging state-law claims against both diverse and non-diverse defendants. Diverse

defendants often prefer to remove cases to federal court due to their perception that the federal forum will be more favorable to them. Under petitioners' theory, such defendants can manipulate the system by removing the case, arguing their defenses as to the in-state defendants, and then arguing those exact same defenses as to the diverse defendants. Forbidding defenses common to all defendants from being used as the basis for a finding of fraudulent joinder ensures that fraudulent joinder is not used as a means to circumvent limits on federal jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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